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*original material
in 277.10*

December 9, 1976

Martin Gross, Esquire, Secretary
Prison Board of Trustees
9 Capitol Street
Concord, New Hampshire 03301

Dear Mr. Gross:

You have asked what procedures must be followed by the Board of Trustees in regard to the removal of the Warden. An Opinion of the Justices dated September 22, 1976 determined that the Governor and Council possess ultimate authority to remove the Warden of the New Hampshire State Prison pursuant to RSA 4:1, which proceedings may be commenced upon petition by the Attorney General or the Board of Trustees.

If the Board of Trustees decides to consider petitioning the Governor and Council for removal of the Warden, it should advise this office as soon as possible so that a determination may be made concerning whether it would be appropriate for this office to serve as the Board's legal representative in such proceedings. If it is decided that this office cannot represent the Board, the Attorney General must petition the Governor and Council pursuant to RSA 7:12 to hire outside counsel for the purpose. Whichever decision is made, the Board should meet with its legal counsel prior to deciding whether and on what basis to petition the Governor and Council for the Warden's removal pursuant to RSA 4:1.

RSA 4:1 requires that a petition to the Governor and Council for removal of the Warden set " . . . forth the grounds and reasons therefor." Accordingly, statements of all grounds upon which removal is to be based must be included in the Board of Trustees' petition initiating removal proceedings. The form of charges

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should include a statement of facts sufficient to show, if proven, "malfeasance, misfeasance, or inefficiency in office, or incapacity or unfitness to perform his duties," or that removal of the Warden would be for the good of the Prison. Though to some degree conclusory, the charges must be sufficiently specific to enable the Warden to prepare a defense. A blank sample of a form by which charges might be presented to the Governor and Council is enclosed with this letter.

Section II of the Procedural Rules for the Board of Prison Trustees (adopted in May, 1976) provides:

Actions by the Board shall be taken by a majority of members present and voting. However, in the event a member must be unavoidably absent from a meeting and has communicated that fact in advance to the Warden's office, the member's vote may be delivered by telephone on the same day as the meeting and in that event, the absent member's vote shall be counted. Provided further, that no personnel action involving removal of an employee or officer under the Board's supervision shall be taken without an affirmative vote of a majority of all members of the Board, voting in person at a meeting duly called for the purpose.

Since the adoption of a petition to the Governor and Council under RSA 4:1 must be considered "a personnel action involving removal of an employee or officer under the Board's supervision," Section II requires that a majority of the full Board vote to adopt such a petition. In addition, the vote must be taken at a meeting called for the purpose of considering the adoption of a petition for the Warden's removal and all votes must be cast in person.

A meeting called by the Board for the purpose of considering the Warden's removal need not be public unless the Warden requests it. RSA 91-A:3(II)(a)(Supp. 1975). For the Warden to exercise the option provided by Section 3(II)(a), he must be given advance notice of the meeting and of its purpose. Regardless of whether the Warden requests an open meeting to consider a petition for his removal, the discussion of the Board on the question whether or not to adopt that petition and forward it to the Governor and Council may be conducted in executive session. RSA 91-A:3 (Supp.

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1975). See also Herron v. Northwood, 111 N.H. 324 at 326 (1971). If the Warden requests an open meeting, RSA 91-A:3 (Supp. 1975) also requires that the Board's vote on those issues be conducted in public.

Finally, there is no statute specifying the obligations of the Board to allow the Warden to speak or participate in any manner in its deliberations. Nevertheless, in order to assure that any petition which is eventually presented to the Governor and Council is based upon a firm factual foundation, the Board of Trustees may consider it advisable to allow the Warden to reply to any charges suggested.

If the Board decides to consider petitioning the Governor and Council for the Warden's removal and this office is able to represent the Board in its actions, an attorney from this office can be available to attend any meetings at which the Warden's tenure in office is considered.

Yours sincerely,



David H. Souter
Attorney General



Andrew R. Grainger
Attorney

Enclosure